IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Appeal No. 081348

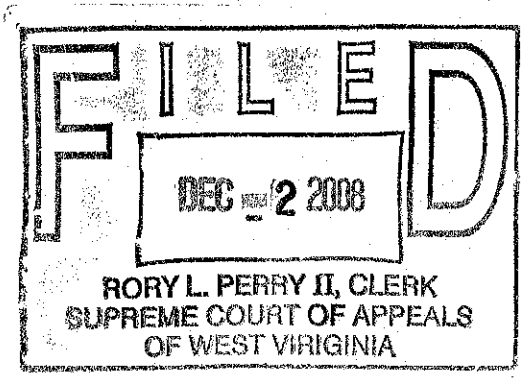
LANGLEY and INEZ FRANCE, individually and
as the Parents and Next Friends of
ROBERT FRANCE, a Minor,

Appellant,

v.

SOUTHERN EQUIPMENT COMPANY,
a West Virginia Corporation,

Appellee.



BRIEF OF APPELLANTS

L. Lee Javins, II, (WV State Bar No. 6613)
Guy R. Bucci (WV State Bar No. 0521)
D. Blake Carter, Jr. (WV State Bar No. 9970)
BUCCI BAILEY & JAVINS, L.C.
Post Office Box 3712
Charleston, West Virginia 25337

TABLE OF CONTENTS

TABLE OF AUTHORITIES

West Virginia Supreme Court Decisions

Other Jurisdictions Decisions

Federal Regulations

West Virginia Statutes

Treatises

I.

KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

This is an appeal from an Order entered in the Circuit Court of Logan County, West Virginia, Perry, J., on November 6, 2007, granting summary judgment in favor of appellants Southern Equipment Company, Inc., (Southern) and against appellees Langley France and Inez France, as the parents and next friends of Robert France (Robert), a sixteen-year-old minor, in a personal injury action.

In granting summary judgment, the Circuit Court erroneously applied the independent contractor defense by dismissing Southern when disputed issues of fact were present concerning whether the industrial metal roof replacement at a height of 25 feet was inherently dangerous, both because it was and because, at Robert's age, it was illegal for him to work on Southern's roof. The Circuit Court also failed to determine this was a multi-employer work site in accordance with federal Occupational Safety and Health Administration (OSHA) standards, thereby requiring Southern to comply with OSHA fall protection standards.

Robert worked for defendant Dan Hensley, d/b/a Royalty Builder (Royalty), which was removing and replacing the metal roof on Southern's industrial facility located at Pecks Mill in Logan County. Royalty did not defend and was without coverage. Appellee settled with defendant Quality Metal Roof Manufacturing and Sales, Inc. (QMR), which supplied the metal roofing material. That settlement was approved at an infant summary proceeding on July 9, 2007.

April 12, 2006 was Robert's second day on the job. He had no training and certainly no experience in roofing work. As part of his employment, he climbed onto the roof of Southern's building located at Peck's Mill in Logan County to help. While working, he fell through the roof

a distance of about 25[1] feet to a concrete floor. He sustained a serious and life-threatening skull fracture that ultimately resulted in a permanently disabling closed head injury. In its Order of November 6, 2007, the Circuit Court decided issues of fact which the record supports were contested by the appellees' evidence.

Based on its evaluation of those contested facts, which included Robert's age, his illegal employment, his inherently dangerous job activity and the existence of a multi-employer work site, the Circuit Court erroneously decided, as a matter of law, that Southern was immune from liability based on the independent contractor defense. The Circuit Court also erred in deciding the disputed factual issues of whether Southern knew that Royalty would perform the labor for the metal roof replacement and whether Southern knew that QMR was only a seller of the roofing material.[2] (Order, ¶¶ 5, 6, 7). While the Court did acknowledge Ken Zigmond, the vice president of Southern, and in charge of the project, had met Mr. Hensley of Royalty before the work started, it is factually disputed whether Southern knew or did not know Quality and Royalty were separate entities and their work would be performed and paid for separately.

Aside from that factual determination, the Circuit Court's Order did not explain a basis for holding Southern not responsible for the illegal conduct of employing an underage worker in violation of both state and federal law. Rather, the Circuit Court ruled as a matter of law that there were no factual issues as to whether the replacement of an industrial metal roof is inherently dangerous and ignored altogether evidence that this roof replacement work occurred at a multi-

---

[1]The Circuit Court Order adopted a height of 25 feet, an ultimately immaterial difference from other descriptions of the roof height in as much as a fall from this height or lower can produce this serious injury. OSHA places the mandatory height for fall protection at six feet.

[2]Although immaterial to the Circuit Court's decision, Paragraph 10 of the November 6, 2007 Order described the minor appellee as "running across the roof." In any event, evidence of running is a contested fact. Robert testified he stepped on an unsecured piece of metal roofing, which gave way and caused him to fall through the roof. State and federal law prohibit a 16-year-old, such as Robert, from working on roofing operations.

employer work site, which required Southern to comply with OSHA fall protection standards. Finally, the Circuit Court decided, by saying it was applying North Carolina law, and in spite of the fact a vast majority of jurisdictions that hold to the contrary and other North Carolina decisions that are contrary to the cases cited by the Circuit Court, that Robert's roofing work was not inherently dangerous.

II.

STATEMENT OF FACTS

As an introductory note, many of the facts set forth here are not included within the four corners of the Circuit Court's November 6, 2007 Order granting summary judgment to Southern. That is because the Circuit Court did not consider any facts relating to the age or illegal employment of the minor appellee, or facts concerning Southern's responsibility for safety on a multi-employer work site.

Adding to the confusion, the Circuit Court substituted the elements of the "abnormally dangerous" standard never raised by appellees for the "inherently dangerous" standard. Even more confusingly, appellees relied on the strict liability standard only with respect to Southern's responsibility for the illegal employment, not arising out of an inherently dangerous activity. The Circuit Court did not grasp this distinction. In the context of this Petition, other instances will be noted where the Court ignored relevant facts, relied on irrelevant facts, or both. Equally confusing is the Circuit Court's reliance on legal standards which are not relevant to the legal issues and its failure to rely on legal standards which are relevant.

Southern owned an industrial building near Pecks Mill in Logan County, and operated an equipment refurbishing business from this location. One of its buildings was in need of a metal replacement roof because it was leaking. In early March, 2006, Ken Zigmond, the vice-president of Southern, in response to a television advertisement by QMR contacted Kevin Akers of QMR to

obtain an estimate for removal of the old roof and installation of a replacement metal roof. (Zigmond depo. pp. 9, 14).

Mr. Akers quickly conducted a site inspection to measure the roof and provided an estimate of Thirty-Three Thousand Dollars ($33,000.00), divided into $17,271.64 for replacement roofing materials and $17,728.36 for the work of removing the old roof and installation of the replacement industrial metal roof. At that point, there was a question whether QMR would perform the removal and installation work. Mr. Zigmond, in his March 8, 2007 deposition, testified that it was his belief that QMR was providing a "turn key job." Mr. Zigmond thought that the old metal roof would be removed and replaced by a new metal roof. (Zigmond depo. pp. 14, 21). However, before any work ever started, Mr. Akers of QMR introduced Mr. Zigmond of Southern to Dan Hensley of Royalty, who was responsible for tearing off the old metal roof and replacing it with new metal panels. QMR supplied the metal roof.

In fact, Mr. Akers testified that he personally visited the building with Mr. Hensley, to allow Mr. Hensley to see first hand the work needed to be done. Both arrived in separate trucks. (Akers depo. p. 58). He further testified that at this visit, Mr. Zigmond came outside to the location where Mr. Hensley was climbing up the ladder onto the roof. (Akers depo. p. 59). Mr. Hensley's truck, even according to Mr. Zigmond, had the name "Royalty Builder" painted on it. (Zigmond depo. pp. 50, 51). Consequently, there was evidence of a separate business to do the work. Finally, Mr. Akers testified that Mr. Hensley would be doing the work and Mr. Zigmond even allowed them to use Southern's ladder to climb onto the roof. (Akers depo. p. 59).

It is clear that Mr. Zigmond, on the first day roofing work started remembered the Royalty Builders' name on its truck. On a later date, Southern paid Royalty Builders, directly by a separate check in its name, for the roof removal and installation. (Zigmond depo. p. 52). Mr. Zigmond testified that it was clear to him after Robert France was injured in the fall from the roof that

Royalty was to be paid separately. (Zigmond depo. p. 53). On the other hand, Mr. Hensley recalls that on the first day he went to the building, Mr. Akers told Mr. Zigmond that Royalty would be doing the roof replacement work. (Hensley depo. p. 19). In fact, Mr. Hensley was specific that he thought he was working for Southern, and that Southern paid him. (Hensley depo. pp. 82, 83).

The roof removal and replacement started on April 16, 2006. Robert was sixteen years old at that time. He was born on November 6, 1989. He asked Mr. Hensley for a temporary job during a school break. There is a family relationship. (Hensley depo. p. 9). When Mr. Hensley hired Robert, it was to work as a "groundman," although Robert was also required to climb on the roof. (Hensley depo. pp. 12, 24). Mr. Hensley testified he told Robert to "always walk where the beams are." (Hensley depo. p. 24).

Robert's young age was noted by Mr. Zigmond. Mr. Zigmond testified that Robert stood out from the other workers because he was younger than them. In fact, Mr, Zigmond acknowledged that, "It was pretty apparent that Robert was younger than the other workers." (Zigmond depo. p. 35). Mr. Zigmond, acting on behalf of Southern, claimed he never knew Robert's exact age, but he said everyone else knew that Robert was a "kid." (Zigmond depo. p. 9). The full exposition of this testimony provides a clear picture of what Mr. Zigmond knew, or should have known, about Robert's age.

Q: Did you recognize him from any of the previous days?
A. No. I seen all of them, but, you know, as far as picking him out from any of the other people, no, I did not.
Q. He didn't stand out that way?
A. Well, he was young. Younger than the other people that was working, yes.
Q. Was that apparent to you?
A. It was pretty apparent, yes.

(K. Zigmond depo. p. 35)

Q. You knew he was a kid, though, didn't you?
A. Yes.
Q. Everybody knew he was a kid?

A. Yeah.

(K. Zigmond depo. p. 90).

The Circuit Court in its Order made findings of fact that the height of the fall was 25 feet, and that "Robert was running." (Order ¶10). There was conflicting evidence that he fell because he stepped on a piece of metal roof from which the bolts had been removed. In any event, it is immaterial why he fell, even if the Circuit Court adopted a finding of fact which conflicted with other evidence on that issue.

Robert's recollection of the fall, understandably, is somewhat limited. His 25-foot fall to a concrete floor resulted in a loss of consciousness, a lengthy hospitalization and a serious closed head injury, which resulted in permanent cognitive impairment. Robert recounted that he had done no previous roofing work. (R.France depo. pp. 11, 12). His job duties included getting tools for other workers and required him to climb onto the roof. (R.France depo. pp. 11, 12). Additionally, Robert recalled he was not instructed to walk only on the beams and could not remember how he fell. (R.France depo. p.12). He did recall he was told that he was taking screws out of the metal. (R.France depo. p. 14).

During his deposition, Mr. Hensley explained that Robert was injured on the second day of the job. Mr. Hensley was not present when Robert fell. (Hensley depo. p. 35). Although entirely irrelevant, and not based on his personal knowledge, Mr. Hensley testified that Robert was running and bringing something to others on the roof when he stepped between the beams and went through the roof where the metal was not yet removed. (Hensley depo. p. 37). There was no question the sheet metal at this location was not secured with screws and that Robert fell through a hole caused by movement of the unsecured metal. (Hensley depo. pp. 37, 38). As for safety, Mr. Hensley admitted that he knew nothing about OSHA fall protection standards. Mr. Hensley never contacted OSHA.

In another version of the fall, Mr. Hensley explained to Mr. Akers that Robert was going across the roof and fell through it. (Hensley depo. p. 58). In any event, Mr. Hensley, from his inspection of the roof, related that the "tin was 'bent down against the beam' and Robert had stepped in the middle of the tin" and fell through. (Hensley depo. p. 49). Mr. Hensley was clear that there was no scaffolding (Hensley depo. p. 64), nor was there any fall protection used on any of his jobs. (Hensley depo. p. 78). In fact, his business owned no fall protection equipment. (Hensley depo. p. 88).

The absence of fall protection was known to Southern. In fact, Mr. Zigmond testified that fall protection, including obedience to OSHA regulations for roofing work, did not exist on the jobsite. (Zigmond depo. pp. 43, 65).

Mr. Hensley made it clear that this job was a different type of work than he had encountered before because there were open holes throughout the entire length of the roof. (Hensley depo. p. 91). He testified that he had no previous experience with an industrial roof. (Hensley depo. p. 92).

Mr. Akers admitted in deposition testimony that he was not informed Mr. Hensley did not provide fall protection equipment, but without fall protection, at the height of the roof replacement, it was unsafe not to provide it. (Akers depo. p. 77). He was told that Robert's fall occurred when he stepped onto an area where a panel was removed, and he stepped through the insulation. (Akers depo. p. 76). Mr. Akers knew Robert was working on the roof, and at lunch one day Robert even offered him a hot dog. (Akers depo. p. 73). He thought the height from the roof to the ground was 20 feet and knew removing the old metal roof created holes. (Akers depo. p. 66). According to Mr. Grenz, appellees' expert witness, fall protection is required above six feet. While it appears no one is exactly certain about the height from which Robert fell, the Circuit Court accepted[3] a height of 25

[3]Appellant Southern's Memorandum in Support of its Motion for Summary Judgment accepted the 25-foot height.

feet. (Order, ¶ 10). This height is accepted for purposes of this appeal. It is without dispute the height was much greater than six feet above the ground, for which OSHA requires fall protection.

Appellant Southern did not produce an expert witness report or offer an expert witness to testify on the liability issues. The Circuit Court made no reference to any expert evidence on appellant's behalf and either refused to consider or completely rejected all of the evidence offered by Mr. Grenz in the areas for which he was qualified to testify.

Mr. Grenz was offered as an expert witness in the areas of safety and fall protection relevant here. They included that: (1) the employment of Robert was illegal, because it violated state and federal child labor laws; (2) the metal roof replacement was inherently dangerous and could not be made safe by taking preventative measures; and, (3) the Southern roofing job involved a multi-employer work site pursuant to OSHA policy, because of the presence of Southern employees on the roof and on the ground below, thereby, imposing OSHA safety requirements, particularly fall protection, on Southern.

Mr. Grenz is a well-qualified expert in the area of workplace safety, in particular the application of Occupational Safety and Health Administration, United States Department of Labor safety regulations and child labor laws, and industrial safety standards as applied to roofing, industrial roofing safety and OSHA safety rules governing multi-employer work sites.

Mr. Grenz stated his career with OSHA in 1983. He then completed 2300 to 2600 hours of formal instruction which was followed by yearly re-training. (Grenz depo. pp. 14, 15). His training included fall protection, and he attended and taught fall protection courses for OSHA. (Grenz depo. p. 17). He qualified to teach the Associated Builders and Contractors Fall Protection program. (Grenz depo. p. 18). Mr. Grenz started with OSHA as a compliance officer and, in that capacity, conducted inspections for seven years. Then, in 1990, Mr. Grenz became an OSHA instructor. A short time later, he began concentrating on teaching construction courses. (Grenz depo. p. 22). He

further specialized in teaching OSHA compliance officers' construction safety courses including fall protection, a course which he chaired exclusively for three years. (Grenz depo. p. 22).

After 11 years with OSHA as a safety compliance officer and seminar training instructor, Mr. Grenz became a safety and health consultant starting in Illinois and soon after moved to West Virginia. (Grenz depo. pp. 24, 28). A significant part of his safety consultant work is for the United States Navy. (Grenz depo. p. 31). For that safety work, he travels all around the world. (Grenz depo. p. 31). In addition to consulting on construction issues for the Navy, including fall protection, his consulting work has also covered the OSHA Training Institute in Denver and business giants, such as Carghill, Dow Chemical, McDonald's and others, on safety issues as well. Mr. Grenz is a member of various national safety associations, including the American National Standards Institute (ANSI), the American Society of Safety Engineers, and the Scaffold Industry Association. (Grenz depo. pp. 43, 47, 48).

Finally, it is interesting that Mr. Grenz devotes only one to two percent of his time and derives only three to four percent of his income from litigation support. (Grenz depo. p. 54). In other words, most of his safety expertise is devoted to actually teaching and enforcing workplace safety.

It is evident from his deposition testimony that Mr. Grenz is not only knowledgeable about the applicable OSHA safety regulations, but he is familiar with the facts at hand. He read the depositions of Mr. Zigmond, Mr. Akers and Mr. Hensley, and of course Robert France, as well as those of other witnesses including Southern employees. (Grenz depo. p. 57).

Robert's Illegal Employment

Mr. Grenz was very specific in his opinion that Robert's roofing work was illegal for any 16-year-old worker, under the previously cited West Virginia statute and this OSHA regulation 29 CFR § 570.67: "All occupations of roofing operators are particularly hazardous and the employment of

minors between 16 and 18 years of age are detrimental to their health." (emphasis added). (Grenz depo. pp. 93, 94). Mr. Grenz testified that federal wage and hour regulations classify the roofing industry as a dangerous occupation, and that "no one under the age of 18 should be on a roofing job." (Grenz depo. p. 93).

"Inherently Dangerous" Liability Standard

Next, Mr. Grenz explained that this metal roof replacement was inherently dangerous in and of itself, because there was "nothing underneath" the roof except open air. He further pointed out that this work was unique among roofing jobs, because it was not "a built up roof where you take off rock and tar and put down new rock and tar. You still have something to stand on." (Grenz depo. p. 91).

Mr. Grenz distinguished this industrial metal roof replacement from other roofing work. As he explained:

> This is not a typical job. It is not like a roofer going around to a residential area and putting metal roofing on a house. This is a very complicated roofing structure that requires pre-planning by an experienced roofing crew. Southern Equipment spent a lot of money in my opinion, putting a new roof on, to the tune of some 33,000 that was allocated for this, and the ultimate decision fell onto Ken Zigmond, but he did present it in front of his board and they gave him the go ahead. So, this is not a small operation. This is a very large building.

(Grenz depo. pp. 90-91).

Mr. Grenz further explained that roof work above six feet, without the use of personal protective equipment or a fall restraint, is inherently dangerous. (Grenz depo. p. 96). Most significantly, and in sharp disagreement with the Court's decision that made no reference to his testimony or cited any other basis for that decision, Mr. Grenz explained that the hazardous condition on this roof could not be eliminated.

Then, Mr. Grenz testified:

> Inherently dangerous would be any elevated work where a protective system is not in place. Once a protective system is in place - - let's say, for example, we gave fall arrest equipment to the worker and he was wearing it. He can still fall through the hole.

(Grenz depo. p. 97)

> Falling on a personal fall arrest system does not guarantee that we won't get hurt on the way down. We could get scraped, cut, sever an artery, because you've got jagged sharp metal. You've got perms, you've got structural steel, all sorts of things.

(Grenz depo. pp. 97, 98)

Mr. Grenz thoughtfully added the following in regard to the issue of eliminating or reducing the hazard of working more than six feet above ground without fall protection:

> When you rely on personal protective equipment as your sole source of protection, that does not say that you're not going to get injured, it says you're not going to get dead. You may still may be injured. And they teach us in the fall protection class, just because you give them the safety equipment doesn't mean they use it, if they challenge that system, they're not going to get hurt because they certainly may. And that in and of itself make it an inherently dangerous job.

(Grenz depo. p. 98).

Multi-Employer Work Site

The Circuit Court missed the point of Mr. Grenz's testimony that Southern had safety responsibility at this work site, by limiting its Order to a question of control as governed by West Virginia common law. That was because. As. Mr. Grenz pointed out, this was a multi-employer work site according to OSHA law. Mr. Grenz explained that Southern was the controlling employer, because it owned the building where the roofing work took place. (Grenz depo. p. 82). Additionally, under the OSHA multi-employer work site doctrine, Southern was required to provide fall protection and other safety measures because its employees are exposed to the hazards of the metal roof replacement and from falling objects falling through the roof. This is because, even as testified to by Southern employees Jerry Shelton and Tom Staggs, Southern's employees were

working both on the roof and beneath it as metal was being torn off and replaced. (Grenz depo. pp. 81, 86, 111, 115).

Finally, Mr. Grenz testified that because of the OSHA multi-employer work site policy, Southern could be cited for failure to provide fall protection. Needless to say, and there was no disagreement at all, there was no fall protection on the roof. (Id., p. 66). Indeed, Mr. Akers of QMR recognized, as did Mr. Hensley, there was no fall protection for this work occurring at more than six feet above ground. In fact, Mr. Hensley had never used nor owned fall protection equipment.

III.

ASSIGNMENTS OF ERROR

The Appellees assign the following rulings by the Circuit Court of Logan County, Perry, J., as error requiring review of the November 6, 2007 Order granting summary judgment to Appellant Southern:

A. **The Circuit Court erred in its November 6, 2007 Order granting summary judgment to Appellant Southern by ignoring the undisputed fact that the minor appellee was only 16 years old at the time of his injury. Therefore, his employment was illegal under West Virginia Code § 21-6-2(a)(16) and the OSHA roofing operations regulation at 29 CFR § 570.67(a), thereby depriving Southern of the independent contractor defense.**

B. **The Circuit Court erred in not understanding that Appellant Southern was subject to liability for Robert's personal injury, because Robert was injured on a multi-employer work site according to federal OSHA law. This required Southern to provide fall protection to Robert, which it failed to do.**

C. **The Circuit Court erred in confusing the "inherently dangerous"activity liability standard with the "abnormally dangerous" standard, and then concluding it had sufficient factual information to determine as a matter of law that Robert's roofing work was not inherently dangerous.**

D. **The Circuit Court erred by relying on North Carolina cases decided by intermediate appellate courts to conclude that the industrial roofing work Robert was doing was not inherently dangerous.**

The Circuit Court ignored Robert's age in its holding, then confused the standards of inherently and abnormally dangerous. Additionally, the Circuit Court held that even though West

Virginia has not answered the question of whether roofing work is inherently dangerous, other jurisdictions, including North Carolinas, have decided it is not. The Circuit Court then cited three North Carolina cases. As explained below, however, those cases which the Circuit Court cited are inapposite, and more importantly, a review of other North Carolina decisions, infra, shows that whether the work is inherently dangerous varies with the facts of each case. A survey of the various jurisdictions in the United States shows that an overwhelming majority of jurisdictions, only six of the 30 that have addressed it, hold that whether an activity is inherently dangerous presents a question of law and while 19 hold it is a question of fact, the others vary between a mixed question of fact and law or decide the issue both ways. Lastly, the Circuit Court failed to even consider Mr. Grenz's testimony that the Southern jobsite was a multi-employer worksite.

IV.

STANDARD OF REVIEW

The summary judgment standard is well-known and frequently explained by this Court. Essentially, this standard derives from Rule 56 of the West Virginia Rules of Civil Procedure, which allows judgment as a matter of law only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." On appeal, this standard requires a plenary or de novo review. Wilson v. Daily Gazette Co., 588 S.E.2d 197 (W.Va. 2003).

Of equal importance is the rule that both the Circuit Court and this court are obligated to "...view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor.'" (internal citation omitted) (emphasis added). (Wilson, 588 S.E.2d at at 202). This Petition amply demonstrates that the Circuit Court violated this rule as well.

Third and finally, and of the equal importance as the other governing principles of review, is the rule that, "[S]ummary judgment should be denied 'even where there is no dispute as to the

evidentiary facts in the case but only as to the conclusions to be drawn therefrom.'" (internal citation omitted). Id. In fact, as this Court has explained, "We have viewed summary judgment with suspicion and have evolved the rule that, on appeal, the facts must be construed in a light most favorable to the losing party." Masinter v. WEBCO Co., 262 S.E.2d 433, 435 (W.Va. 1980).

A dispute about a material fact is genuine when evidence relevant to it, viewed in the light most favorable to the party opposing a summary judgment motion, is sufficiently open-ended to permit a rational finder of fact to resolve the issue in favor of either side. Here, the Appellants have shown there was ample evidence for a trier of fact to infer that Robert's employment violated state and federal child labor laws, his roofing work was inherently dangerous and its hazards could not be significantly eliminated or reduced by special precautions, and his job was at a multi-employer work site. In its summary judgment order, the Circuit Court erroneously acted as the fact finder and then applied the wrong legal standards to the facts it determined regarding those issues.

V.

ARGUMENT

A. The Circuit Court erred in its November 6, 2007 Order granting summary judgment to Appellant Southern by ignoring the undisputed fact that the minor appellee was only 16 years old at the time of his injury, and, therefore, his employment was illegal. This fact should have deprived Southern of the independent contractor defense, which the lower court's Order permitted this Southern to use.

Despite the fact that Robert's age was an issue, there is no reference in the Circuit Court's November 6, 2007 Order to deposition testimony by Ken Zigmond, Southern's vice president and the person in charge of Robert's work site, connecting Southern and whether it knew or should have known Robert was under 18 years of age. In Paragraph 20 of its Order, the Court referrred to West Virginia Code § 21-6-2(a)(16), which is mistakenly cited as West Virginia Code § 21-6-2(a)(16) . This is that state statute that rendered Robert's employment illegal. (Order ¶ 20). The Court,

however, exculpated Southern by dismissively concluding that "...Royalty Builders was the employer of Robert France, not Southern Equipment Company." (Order ¶ 20).

In reaching its conclusion, the Circuit Court necessarily engaged in an impermissible factual determination by either ignoring this inculpatory testimony of Mr. Zigmond or dismissing it as irrelevant. It is not clear which. Either way, the Circuit Court engaged in forbidden fact-finding by not connecting testimony that shows Mr. Zigmond, and hence Southern, knew, or should have known, that Robert's age made his roofing work illegal.

It is well accepted in our jurisprudence that the appellate review of a grant of summary judgment is plenary. Further, it is required of this Court, as it was of the Circuit Court, to view the entire record in the light most favorable to the party opposing the motion. Wilson v. Daily Gazette Co., 588 S.E.2d 197 (W. Va. 2003). Whether Southern knew and should have known Robert's age is the classic question of fact for a jury not for a Court to decide. Sutton v. Monongahela Power Co., 158 S.E.2d 98 (W.Va. 1967). Zigmond's binding admission on Southern requires it to exercise reasonable care to determine Robert's age, because employment of a 16-year-old for roofing operations six feet or higher above ground level is illegal under the West Virginia statute and federal OSHA regulation quoted above. West Virginia Code § 210602(a)(16) states: Employment of children under eighteen in certain occupations: appeal to Supreme Court (a), "No child under eighteen years of age may be employed, permitted or suffered to work in, about, or in a connection with any of the following occupations (16) Roofing operators above ground level." (Emphasis added).

The federal regulation not only makes such employment illegal, but calls it "particularly hazardous," as 29 C.F.R. § 560.67 provides:

> ...all occupations in roofing occupations are particularly hazardous for the employment of minors between 16 and 18 years of age or detrimential to their health. (Emphasis added).

In Shaffer v. Acme Limestone Co. Inc., 524 S.E.2d 688 (W.Va. 1999), this Court held in Syllabus Point 6, and there is not authority to the contrary and no dissenting opinion, that:

> The independent contractor defense is unavailable to a party employing an independent contractor when the party (1) causes unlawful conduct or activity by the independent contractor, or (2) knows of and sanctions the illegal conduct or activity by the independent contractor, and (3) such unlawful conduct or activity is a proximate cause of an injury or harm. (emphasis added).

The Shaffer syllabus point states the foregoing principle in the disjunctive. Therefore either (1) or (2) must be satisfied, but both are not required. Here, Southern admittedly knew that: Robert was working on its roof; he was employed by Royalty; and it (Southern) absolutely permitted or suffered Robert to work at the height of 25 feet without fall protection or any kind of training.

The legislation regulating the illegal conduct by the employment of an underage person to do work on a roof selected the terms "permitted or suffered to work." These terms are much broader than the narrow term "employed" used by the Circuit Court. The Court erroneously limited the scope of the statute's application by limiting responsibility only to the employer.

This child labor statute must be broadly applied to protect the welfare of the young. Many states enacted child labor laws in the early years of the last century, including West Virginia and New York.. In Harper v. Cook, 82 S.E.2d 427 (W.Va. 1954), the state supreme court applied the terms "permitted" and "suffered to work" to mean that the "defendant would have had to have knowledge that he (the child) was working there." Id. at 433. There is ample evidence that Mr. Zigmond, Southern's vice president, had notice of Robert's age and the fact he was working on the roof.

New York faced an identical circumstance and unhesitatingly imposed liability. In Vincent v. Riggi & Sons, Inc., 30 N.Y.2d 406, 409 (N.Y. 1977), the Court applied a standard virtually identical to the one espoused by our supreme court in Harper, supra. In Vincent, a 13-year-old boy was injured while cutting grass with a power lawnmower. The Court upheld liability and said:

"'Employee' is elsewhere defined to include those permitted or suffered to work (Labor Law § 2; subd.7)." (emphasis added). That language has been construed to include independent contractors. Thus, in Koenig v. Patrick Constr. Corp., 298 N.Y. 313 (N.Y. 1948), the Court interpreted the similar phrase "employing or directing another to perform labor of any kind" as covering both employees and independent contractors. (Id., at 316-17).

In Bernal v. Baptist Fresh Air Home Soc, 87 N.Y.S.2d 458 (N.Y.A.D. 1949), the Court considered both Sections 130 and 2 (subdiv. 7) of the New York Labor Law and construed the phrase "permitted or suffered to work" was interpreted as encompassing children employed by a subcontractor when the principal had knowledge of the employment. *See also* Clark v. Arkansas Democrat Co., 413 S.W.2d 629 (Ark. 1967) (interpreting the phrase "employed and permitted to work" in a child labor statute as covering an independent contractor) So, there is no judicial approval for the Circuit Court to provide the safe harbor the Court afforded Southern when child labor laws are violated.

Finally, the Circuit Court's dismissal of the claim of the minor appellee, who was critically injured as the result of illegal employment activity. nullifies the strong legislative protection aimed at preventing those employers who, as did Southern, knew "a kid" was working on a roof, without a subfloor, without fall protection, with large openings, and without any training or experience. It was callous for Southern to disregard that evidence a child was employed to perform work deemed detrimental to his health, and even worse for the Circuit Court to ignore that evidence. This decision also violates the principals recognized in Worley v. Beckley Mechanical, Inc., 648 S.E.2d 620, 626 (W. Va. 2007), where, in another, but closely related context (those suffering from the disability of a "mental illness"), this Court, in the majority opinion of Justice Maynard, explained why special rules apply to those whom society must protect:

"To hold otherwise would deny the protection of the laws to some of the weakest

and most vulnerable people..."

The Circuit Court of Logan County violated this very principle here and sided with Southern, which actually knew Robert was young, a kid, and younger than everybody else; he was among the weakest and most vulnerable and instead of protecting him, the Court protected the wrongdoer. The evidence here established issues of fact about Southern's knowledge of Robert's age for a jury to decide, not to be decided as a matter of law.

Perhaps the most severe departure between West Virginia law and the Circuit Court's opinion allowing Southern immunity is that the Circuit Court cites Shaffer v. Acme Limestone Co., Inc., 524 S.E.2d 688 (W. Va. 1999), yet does not apply one of its fundamental holdings. That holding is the independent contractor defense is inapplicable when the work is illegal. Illegal work is a category separate from inherently dangerous work although in both instances the independent contractor defense is inapplicable, as discussed infra.

Each of the elements of Shaffer established the illegal activity exception are satisfied in the evidence presented to the Circuit Court. Inexplicably, the Circuit Court dismissed Appellant Southern simply by holding that the responsibility for Robert's employment was limited to Royalty. (Order, ¶20). Moreover, the appellees satisfied their burden under Rule 56 of the West Virginia Rules of Civil Procedure to present a triable issue of fact as to whether Southern Vice President Zigmond knew, or should have known, Robert was underage for employment in roofing work Mr. Zigmond testified that Robert was a kid, young and younger than the others (Zigmond depo. Pp. 9, 35).

It is quite clear that adequate facts were presented showing that Mr. Zigmond knew, or should have known, of Robert's youthfulness and should have made reasonable inquiry concerning his age. The Circuit Court violated the most basic summary judgment principles, by allowing the movant all favorable inferences and granting summary judgment when genuine issues of fact existed.

See Alpine Property Owners Ass'n, Inc. v. Mountaintop Development Co., 365 S.E.2d 57 (W.Va. 1987).

It is worthy to note that the first two principles of Syllabus Point six of Shaffer are stated in the disjunctive. As such, there is a jury question presented to the alternative requirement whether Southern knew of and sanctioned the illegal conduct or activity. No reasonable person could dispute that Mr. Zigmond's testimony connecting Robert's evident youth and Zigmond's knowledge Robert was working on the roof establishes more than an issue of fact whether Southern violated child labor laws in permitting or submitting Robert to work on Southern's roof.

Moreover, once those facts were established and the proper law applied, it necessarily follows that this illegal employment activity was a proximate cause of Robert's injury. After all, the pertinent federal OSHA regulation deems roofing work performed by a minor to be "particularly hazardous." Some authorities impose strict liability when a violation of a child labor law results in an injury. See Bybee v. O'Hagen, 612 N.E.2d 99 (Ill. App. 4 Dist. 1993).

Child labor statutes are intended to place liability upon the employer of an independent contractor, so that he is liable for injury to a child working at his premises even though the minor is not his employee. The France appellees need only show a violation of the statute, which must be resolved by the jury in the first instance, and injury to the child in order to prevail. Legal or proximate causation is not in issue, because the West Virginia Legislature has determined that causation exists. In short, once a violation is established, these cases have construed child labor statutes to impose strict or absolute liability. W. Prosser, Contributory Negligence as Defense to Violation of Statute, 32 Minn. L. Rev. 105, 118-120 (1948).

There is, in reality, no reasonable explanation for the Circuit Court to decide that Robert's employment was only Royalty's responsibility. Reasonable minds could differ concerning Robert's illegal employment, and whether Mr. Zigmond, Southern's vice president and the person in charge

of the job site, knew of or approved that unlawful activity. The Circuit Court's decision cannot stand when it is written to avoid facts establishing liability and did not evenhandedly include facts supporting Southern's liability. In the end, the Circuit Court was an advocate for those violating child labor laws, and not a protector of the weakest and most vulnerable party who needed protection in this case.

The Circuit Court, in its Order granting summary judgment to Southern, never addressed the issue that Robert's underage employment in roofing work was illegal under both federal and state law. The pertinent state statute, West Virginia Code § 21-6-2(a)(16) is quoted above. The relevant OSHA regulation is at 29 C.F.R. § 570.67. It states: "All occupations in roofing operations are particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health."

The Circuit Court did not address the evidence of an illegal activity in connection with Robert's employment in its summary judgment order. Instead, the Court supported its dismissal of Appellant Southern from this case by conferring immunity on Southern through the independent contractor defense. However, the Circuit Court, even though it cited to the case, never mentioned the part of the holding in Shaffer v. Acme Limestone Co. Inc., 524 S.E.2d 688 (W. Va. 1999), that the independent contractor defense is not available when the work involves some illegal acts.

Mr. Zigmon, testifying as Vice President, and on Southern's behalf, described Robert as "young," a "kid" and younger than the other workers. However, the Circuit Court missed the factual connection between that testimony and the statutorily forbidden employment of an underage worker for which Southern is responsible by the terms of the aforementioned West Virginia statute. Mr. Zigmond's testimony creates a question of fact for a jury to decide as to whether it was illegal to employ Robert at Southern's building to work on a roofing operation. The record presented to the Circuit Court established issues of fact whether Southern knew or should have known Robert was

not 18 years old. Yet, without citing any factual basis, the Circuit Court decided only that Southern was not the employer of Robert France.

Ignorance of the law is certainly no defense, and it is equally true the Circuit Court's effective silence of determining, as a matter of fact and law, Robert's employment at the Southern building in connection with roofing work was not illegal because it decided he was merely employed by Hensley, is clearly error. In fact, the Court's order does not mention that the work was illegal, or that the age of the minor appellee, as was known or should have been known by Souther, presented a jury question. Rather, the Court sidestepped the issue entirely by saying Robert was employed by Royalty.

Finally, the Circuit Court erred in not recognizing that the strict liability standard was based on Southern's responsibility from Robert's employment in violation of state and federal child labor laws. In fact, the Circuit Court was very confused as to the "inherently dangerous" activity liability standard, because it required appellees to prove the elements of the more stringent "abnormally dangerous" standard. Furthermore, the court below improperly used those two terms interchangeably and thus confused "abnormally dangerous" with "inherently dangerous." In any event, the Circuit Court missed the point altogether that employment of a16-year-old for roofing work is an illegal act, which stripped Southern of the independent contractor defense and made that defendant subject to strict liability.

Regarding Judge Perry's concern that Mr. Grenz attempted to advance a "strict liability" rule, appellees are unaware of any decision by this, or any other, Court that applies a rule of strict liability even when an adult worker is injured as the result of an inherently dangerous workplace condition. It is clear the Circuit Court confused the theory of "inherently dangerous" activity with that of illegal employment. However, if the jury determined Southern knew or should have known Robert was

underage, then Southern would be liable for an illegal act and, only then, could strict liability properly be imposed.

B. The Circuit Court erred by confusing the "inherently dangerous" activity liability standard with the "abnormally dangerous" standard in its summary judgment order.

In its summary judgment order, the Circuit Court also cited Shaffer v. Acme Limestone Co. Inc, supra, concerning the rule defining "inherently dangerous" activity. (Order, ¶16). Then, inexplicably, in the very next paragraph, the Order cited the definition of "abnormally dangerous," which can trigger strict liability. (Strict liability applies here, however, only in the context of Appellant Southern permitting a child labor law violation to occur during the roofing work in which Robert was injured.)

Compounding the confusion, the Circuit Court incorrectly cited the Restatement (Second) of Torts § 519 (1976) as the source of six factors to be considered in determining whether an activity is "**abnormally dangerous**." These six criteria are set forth in footnote 5, *supra*. The Circuit Court stated that in applying those factors, "One must reach the conclusion that roofing is not an inherently dangerous activity." (Order, ¶ 17). Needless to say, it is difficult to follow the circuit judge's reasoning. The lower court made no analysis to discern the difference among the "inherently dangerous," "abnormally dangerous," and "strict liability" standards.

For this reason alone - application of a confusing and incorrect definition of the "inherently dangerous" activity standard - the Circuit Court's summary judgment order should be reversed. It is noteworthy that in King v. Lens Creek Ltd. Partnership, 483 S.E.2d 265, 271 (W.Va. 1996), this Court did not pass on the issue of whether an "inherently dangerous" activity presents a jury question. In King, the case was decided based on a certified question, so there were no facts in dispute. The only question was whether operating an unloaded logging truck was inherently dangerous. The King Court made clear that the operation of an empty logging truck is not, in and

of itself, dangerous such that harm will result if special precautions are not taken. It is, therefore, only dangerous if operated in a negligent manner.

To support its erroneous holding that industrial roof replacement work at a height of25 feet above a concrete floor performed by a 16-year-old was, as a matter of law, not inherently dangerous, the Circuit Court tangled the issues by confusing the "inherently dangerous" activity liability standard to mean "strictly liable." The Circuit Court on its own raised and rejected the "abnormally dangerous" liability standard[4], which the appellees never advanced. Then, applying this standard, the Circuit Court held that there was a sufficient factual basis to hold that it could decide, as a matter of law, this activity was not inherently dangerous. It is erroneous to say appellees cannot meet the test for inherently dangerous when the Court required proof to meet the abnormally dangerous standard. (Order, ¶¶16, 17). Essentially, the Court erroneously resolved all factual issues favorably to Southern and against Robert and then applied the wrong legal standard of abnormally dangerous, which it apparently construed to mean "strictly liable," a liability standard which applied with respect to appellees' theory of liability based on the illegal employment of Robert, and not on the separate theory of inherently dangerous activity.

Interestingly, in a point not captured by the Circuit Court, this Court in King v. Lens Creek Ltd. Partnership, 483 S.E.2d 265, 271 (W.Va. 1996) pointed out that the terms "inherently dangerous" and "abnormally dangerous" are not synonymous.[5] So, it was clearly error for the Circuit Court to use those terms interchangeably.

---

[4]The Restatement (Second) of Torts §520 sets forth these criteria. It states: "In determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes."

[5] The King Court explained that the tenns "intrinsically dangerous" and "inherently dangerous" are interchangeable.

C. The Circuit Court erred by relying on North Carolina cases decided by intermediate level appellate courts to conclude that roofing work is not inherently dangerous.

In its Order granting Southern summary judgment, the Circuit Court issued a sweeping but totally wrong generalization about the state of the law in North Carolina. Without a thoughtful analysis, the lower court said, "[O]ther jurisdictions including North Carolina [no others were cited] have held that [roofing], like other construction activities, is not an inherently dangerous activity." (Order, ¶17). For this proposition, the Circuit Court cited Olympic Products v. Roof Systems. Inc., 363 S.E.2d 367 (N.C. App. 1988), Canady v. McLeod, 446 S.E.2d 879 (N.c. App. 1994), and Brown v. Friday Services. Inc., 459 S.E.2d 356 (N.C. App.1995). The lower court cited these cases as if they were opinions of the North Carolina Supreme Court. However, they were all decided by intermediate level appellate tribunals.

An analysis of the three decisions cited above does not yield support for Judge Perry's ruling, which itself completely contradicts another North Carolina case, Lane v. R.N. Rouse & Co., 521 S.E.2d 137 (N.C. App. 1999). A review of North Carolina law on this subject shows that, at best Judge Perry limited his survey of the cases to the three he cited. He ignored a robust body of law in North Carolina and elsewhere to the contrary.

In Lane, the plaintiffs decedent was hired to perform concrete finishing work on the second floor. He stepped through an opening and died when he fell through to the first floor. Without dissent, in sustaining a verdict for the decedent's estate, the Court of Appeals held that the issue of whether concrete finishing was inherently dangerous was for the jury. The appellate court also held that the trial judge was correct in declining to conclude, as a matter of law, that concrete finishing work was not inherently dangerous.

The Lane court identified as considerations in its decision the fact that the decedent was required to walk backwards while working, which required his intense attention. Furthermore, the

defendant was aware of the floor opening through which the decedent fell, but had not cover it prior the fatal accident. Thus the Court concluded, "A job requiring a worker to walk backwards while paying close attention to the work in front of him might well be construed to be inherently dangerous, and the jury in this case so found." Id. at 139. Furthermore, in Lane the appeals court observed that the work could have been made safer through use of adequate safety precautions. Id. The Lane court went on to explain that the party who employs an independent contractor "has a continuous responsibility to ensure that adequate safety precautions are taken." Id. at 139.

Lastly, the Lane court acknowledged: "One who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others." Id. That is exactly what the Circuit Court allowed Southern to do in the case at bar - delegate its duty to Royalty. That is clearly error and compels reversal. Moreover, the North Carolina cases cited by the Circuit Court are of dubious value and distinguishable on their facts from the present case.

First, Olympic Products v. Roof Systems. Inc., 363 S.E.2d 367 (N.C. App. 1988), was a commercial case decided without the benefit of any fact issues. The only issue was whether re-roofing itself was inherently dangerous, not any particular re-roofing, let alone the roof replacement undertaken by the minor appellee in the case sub judice. None of the various dangerous conditions confronting the minor here existed in Olympic Products, which has been superseded, if not reversed, by Lane.

In Canady, supra, there was no evidence of an inherently dangerous activity, other than the fact that the day of the fatal accident was windy, to explain how plaintiff's decedent fell. Additionally, there was some evidence that the decedent had been drinking alcohol prior to his fall. The Court in Canady, unlike the Circuit Court here, recognized that after Olympic Products was decided by a lower appellate court, the North Carolina Supreme Court rendered its opinion in

Woodson v. Rowland, 407 S.E.2d 222, 227 (N.C. 1991). Woodson rejected the application of "bright line rules" and required the court to consider the particular circumstances of each, which clearly means the facts in issue, and which did not occur here. The Logan County Circuit Court did not cite Woodson in its summary judgment order, which is in direct conflict to the ruling herein and North Carolina precedent upon which the Circuit Court claimed existed. The Circuit Court clearly erred in deciding the issue here in a vacuum without considering the facts and ignoring all the relevant factors presented by Mr. Grenz. Ultimately, Canady falls far short of presenting a precedent.

Finally, in Brown v. Fridav Services. Inc., 460 S.E.2d 356 (N.C. App. 1995), the Court's decision that roofing was not inherently dangerous rested on a pleading deficiency. There was no allegation that the roofing work was inherently dangerous. In fact, the Court said, "A brief review of the plaintiff's complaint makes the resolution of this issue easy, the complaint merely alleges that Westinghouse failed to provide Kassen's employees a safe place to work." That Complaint, ".. . does not sufficiently allege that the roofing work performed. . . was inherently dangerous." It does not say, as does the Circuit Court's November 6, 2007 summary judgment order citing Brown, that this is only a question of law.

Once the entire body of relevant North Carolina law is examined, it strikes the Appellants that were an opposing party to represent to a Court that a certain jurisdiction holds, as the Circuit Court should here, that inherently dangerous activity is a question of law, and then it is learned there is a robust body of law to the contrary on that very question one would question the candor of this legal argument and its failure to make an effort to show the conflict in decisions on the issue within that jurisdiction. That lack of candor is particularly significant here, because the three cases cited have so little to do with the facts of this present action that those North Carolina intermediate appellate court decisions are meaningless.

The Circuit Court also placed great reliance in its November 6, 2007 summary judgment order on Robertson v. Morris, 546 S.E.2d 770 (W.Va. 2001). In Robertson, the Circuit Court granted summary judgment against the plaintiff, who was injured while cutting a tree at a residential location. The Supreme Court held that tree cutting was not inherently dangerous, because taking safety precautions would have made the work safer. Id. at 774. There was, in Robertson, no evidence by an expert or anyone else that the tree cutting could not be made safer. In a very real sense, Robertson simply has nothing to do with this case. Nonetheless, the Circuit Court, by unduly emphasizing that decision, ignored other important legal principles and controlling evidence in its summary judgment order.

Separate and apart from the existence of factual issues raised by Mr. Grenz concerning the "inherently dangerous" liability standard as applied to roofing activity, which were never considered or explained by the Circuit Court, there are at minimum three very significant reasons why the Court erred in awarding summary judgment to Appellant Southern. First, the Court did not correctly interpret North Carolina law, which at best is conflicting on this issue, and did not analyze the North Carolina cases it cited, all of which are factually different.

Second, the Circuit Court did not consider that only six of the 30 jurisdictions addressing this issue hold that whether an activity is inherently dangerous is a question of law. The majority of those jurisdictions (19) hold that the issue is a question of fact. Four jurisdictions, including North Carolina, have held both ways. Pennsylvania holds that the issue is a mixed question of law and fact. In his Order granting summary judgment to Appellant Southern, Judge Perry essentially selected a minority view from a jurisdiction that holds both way to bolster his ruling, which he incorrectly characterized as the majority view.

A survey of those jurisdictions deciding the issue presented here of whether an activity, including roofing or construction, is inherently dangerous reveals an overwhelming majority, 19 in

all, hold that is a question of fact for the jury to decide. Those jurisdictions are: Alabama, Ledbetter-Johnson Co. v. Hawkins, 103 Soold 748 (Ala.,1958); California, Caudel v. East Bay Mun. Utility Dist., 211 Cal. Rptr. 222 (Cal. App. l.Dist.,1 985); Colorado, Western Stock Center. Inc. v. Sevit. Inc., 578 P.2d 1045 (Colo., I 978); Connecticut, Gurland v. D'Adamo. 579 A.2d 144 (Conn. Super.,1990); District of Columbia, Levy v. Carrier, 587 A.2d 205 (D.C.,1991); Florida, Doak v. Green, 677 So.2d 301 (Fla. App.l Dist., 1996); Georgia, Community Gas Co. v. Williams, 73 S.E.2d 119 (Ga. App.,1952); Hawaii, Nofoa v. U.S., 132 F.3d 39, 1997 WL 796198, Unpublished Disposition" C.A.9 (Hawaii),December 30, 1997; Kentucky, Pine Mountain R. Co. v. Finley, 117 S W. 413 (Ky., 1909); Maryland, Washington Suburban Sanitary Commission v. Grady Development Corp., 377 A.2d 557 (Md .Spec. App. 1977); Massachusetts, Marino v. Trawler Emil C. Inc.. 213 N.E.2d 238 (Mass.,1966); Michigan, Warren v. McLouth Steel Corp., 314 N.W.2d 666 Mich.App.,1981; New Hampshire, Elliott v. Public Service Co. of New Hampshire, 517 A.2d 1185 (N.H.,1986); New Jersey, Majestic Realty Associates, Inc. v. Titi Contracting Co., 149 A.2d 288 (N.J. Super. App.1959); New York, Rosenberg v. Equitable Life Assur. Soc. of U.S, 595 N.E.2d 840 (N.Y.1992); Oregon, Golden v. Ash Grove Cement Co., Slip Copy, 2007 WL 1500168 (D. Or.,2007) (citing Snyder v. Prairie Logging Co., 207 Or. 572, 577 (1956)); Rhode Island, Blount v. Tow Fong, 138 A. 52 (R.r. 1927);Texas, Sun Oil Co. v. Kneten, 164 F.2d 806 (C.A.5.Tex.1947); and Washington, Garza v. McCain Foods, Inc., 124 Wash. App. 908, 103 P.3d 848 (Wash. App. Div. 3 2004).

Additionally, there are four jurisdictions which hold on both sides of the issue, although, at least one of these jurisdictions, North Carolina, Woodson, supra decidedly favors a factual analysis and case by case approach, neither one of which was followed by Judge Perry. One jurisdiction, Pennsylvania, says this issue is a mixed question of law and fact while a distinct minority of Court, six (6) hold this presents a question of law.

By Appellant's count, only six of 30 jurisdictions hold it is a question of law whether an activity is inherently dangerous. But even then, the instant case presents sufficient facts to deny summary judgment following the legal principles states in some of those jurisdictions. For example, one jurisdiction, Louisiana, in Touchstone v. G.B.O. Corp., 596 F. Supp. 805, 814. (E.D. La. 1984), explains this very point that while the question of the activity in that case, referred to as "ultra hazardous," is a question of law, the answer to that question turns on the factual question of whether the activity can be made safe. In the instant case, Mr. Grenz testified upon deposition that the industrial metal roof replacement work at issue could not be made safe. So, it appears that applying Louisiana law, this case would not have been dismissed.

After surveying all decisions, one particular case, Donovan v. General Motors, 762 F .2d 701 (8thC ir. 1985) (applying Missouri law), is most apt, as it presents a closely parallel set of facts. However, the injured worker in Donovan was an adult, and fact that makes its holding even stronger when applied here. Plaintiff Donovan was an employee of an independent contractor hired to work on an unfinished roof. He fell approximately 28 feet after stepping through a plywood panel that gave way.

The Eighth Circuit in Donovan reversed a grant of summary judgment to General Motors, because the district court erred in holding that ordinary construction work is not inherently dangerous. Describing that ruling as "painting with too broad a brush," that court of appeals noted that Missouri law considers not general categories of work, but the specific work involved in a case. Id. at 703. The Donovan court said whether a particular type of work is inherently dangerous is generally a question of fact for the jury. The federal appellate court pointed out that, "... reasonable minds could differ on whether working on an unfinished roof at a height of approximately 28 feet is work which 'necessarily presents a substantial risk of danger unless adequate precautions are taken.'" Id. at 703. Donovan is frequently cited and followed in cases such as the one at hand. Third,

the Circuit Court erred in nullifying the opportunity for a jury to decide the "inherently dangerous" activity issue in the present case, when it is the judicial policy of this state to trust jurors to make such a determination when evidence is conflicting.

This Court has previously confronted the liability issue of an inherently dangerous activity. In King v. Lens Creek Ltd. Partnership, *supra*, the Court provided useful guidance on analyzing this issue. First, King pointed out it is improper to use the terms "inherently dangerous" and "abnormally dangerous" interchangeably. 483 S.E.2d at 270, fn. 8. However, that is exactly what the Circuit Court did in the present case yet that is exactly which the Circuit Court did here. By misunderstanding the "abnormally dangerous" activity standard, the Court concluded roofing was not inherently dangerous. That makes it impossible for the appellees to prove their case because, the Court imposed a standard that is too stringent and inapplicable.

Lastly, this Court has addressed the issue of what is an "inherently dangerous" activity in a context so closely related to the present case that the same result must apply here. In Brown v.Carvill, 527 S.E.2d 149 (W.Va. 1998), the Court recognized that in deciding whether a certain instrumentally or condition was dangerous is "[m]ore often than not. . . a question of fact rather than law." Id. at 154. Accordingly, West Virginia law does not favor the restrictive result reached by the Court below in the case at bar.

D. The Circuit Court committed error by failing to rule that Robert was injured at a multi-employer work site, which required Appellant Southern to provide fall protection.

Under West Virginia common law, the Circuit Court did not need to determine who controlled the work site. In fact, the control standard derives from OSHA regulations, which impose the requirement that a controlling employer must comply with OSHA fall protection standards. See 29 C.F.R. §1926.501. Without even considering the evidence of the OSHA mandate, the Circuit Court erroneously concluded that the OSHA standard did not apply "to the owner of a premise where

the worker is an independent contractor and not an employee of the owner." More specifically, the Circuit Court erred in essentially holding Southern was only the owner of the premises and not in control, even though its employees were working on the roof and beneath open holes during the industrial metal roof replacement work.

The Circuit Court also overlooked Mr. Grenz's analysis that Southern, as a controlling employer, was required to comply with OSHA regulations mandating fall protection. (Grenz depo. pp.82, 83, 87,115). As such, Southern was subject to an OSHA citation for violations of OSHA fall protection standards. He further explained that Southern was a controliing employer, because it had control of the roof and who went onto it. (Grenz depo. p.84). To support his opinion, Mr. Grenz relied on the OSHA Field Information Resource Manual.

A central point of the evidence on which Mr. Grenz relies in establishing the OSHA multi-employer work site is found in the deposition testimony of Mr. Jerry Shelton. Southern employed Mr. Shelton, who was working in the area beneath the roof replacement work and on the roof itself. Mr. Shelton testified that the roof above had been pulled up; that you could watch the work as it progressed and you could even "see the sun coming through the insulation." (Shelton depo. p. 14).

Another Southern employee, Tom Staggs, was fully corroborative of Mr. Shelton. Mr. Staggs testified that he could see the original roof material was pulled away and that Southern employees did not "get out of the way from down below."[6] (Staggs depo. pp. 40, 41). As Mr. Grenz explained, with the roof open to this area where Southern employees were working below, they would be exposed to falling objects. (Grenz depo. pp. 73,74). This scenario would subject Southern to an OSHA citation.

---

[6] Needless to say, the catastrophic injury to Robert would have been worsened had a Southern employee been at that location when he fell.

Additionally, in his deposition testimony, Mr. Grenz relied on and testified to his handwritten notes which explained that Mr. Shelton, on behalf of Southern, climbed onto the roof to inspect for leaks and that in itself is a violation of OSHA standards for fall protection . (Id. at p. 76). Performing this task in compliance with the law would require a horizontal safety cable and a retractable lanyard (Id.). Any worker six (6) feet above ground requires fall protection. (Id. at p.77). On a closely related issue, the Circuit Court in granting summary judgment erroneously did not even consider the evidence offered by appellees that Southern had responsibility to provide fall protection because this was a multi-employer work site.

On a related issue, the Circuit Court in the case sub judice absolutely refused to consider the element of control of the work site by Appellant Southern under the well-accepted OSHA doctrine on multi-employer work sites. The Circuit Court, in its Order, simply concluded that OSHA does not apply to Southern as a premises owner. (Order at ¶15).[7] Furthermore, the Circuit Court applied incorrect legal principles requiring control by Appellant Southern over Robert. (Order at ¶18). That analysis completely misses the point made by Mr. Grenz that, under OSHA regulations, this was a multi-employer work site (Grenz depo. p. 81). Further, not only did Mr. Grenz point out that Southern's employees were working both on the roof and under the roof as roof replacement was occurring, but two Southern employees, Jerry Shelton and Torn Staggs, testified they worked on and under the open roof as it was being replaced. Mr. Grenz explained that they were, therefore, exposed to hazards just the same as Robert and other Royalty employees were.

Mr. Grenz carefully explained, for those reasons, Southern was deemed by OSHA standards a controlling employer (Grenz depo. p. 82). Judge Perry was, therefore, wrong to characterize

[7] The Order states, "The Federal Occupational Safety and Health Act does not apply to the owner of a premises where the worker is an independent contractor not an employee of the owner." The Court fundamentally misunderstood the implications of OSHA policy and interpreted its provisions in the absence of the application of those standards.

Southern as merely the premises owner. That appellant was involved with Robert's workplace injury in much more than just a passive capacity. Southern was an active participant, in that, not only were its employees on the roof, but they were exposed to falling objects or workers, such as Robert, who may have fallen through the roof openings created overhead while they worked.

The appellees' expert witness, Mr. Grenz, testified at deposition that because Appellant Southern was a controlling employer at a multi-employee work site, it was required to follow OSHA fall protection mandates. (Grenz depo. pp. 81, 82, 85). These standards are found at 29 C.F.R. §1926.501. Judge Perry completely missed this point, although it has support in the law. In a very real sense, the Circuit Court apparently believed that neither OSHA safety regulations, nor, for that matter, child labor laws, apply to protect workers in Logan County. However, the law is well settled that violation of an OSHA standard is relevant evidence in establishing liability. See, e.g., Thoma v. Kettler Bros. Inc., 632 A.2d 725 (D.C. 1993). In the present case, the Circuit Court's Order granting summary judgment to Appellant Southern denied the minor appellee basic safety protection to which is age and his job on a multi-employer work site entitled him. Robert's illegal employment, the fact that the inherently dangerous nature of the metal roof replacement work was doing could not be made safe, and Appellant Southern's status as a controlling employer at a multi-employer work site all indicate that the Circuit Court erred in granting summary judgment and thereby granting immunity to Southern when it should have been held liable for Robert's devastating head injury.

The Circuit Court's failure to consider the evidence offered in the form of Mr. Grenz's expert opinion testimony violated the principle of Rule 702 of the West Virginia Rules of Civil Procedure. A good example of a similar error is illustrated in Sheely v. Pinion, 490 S.E.2d 291, 297 (W.Va. 1997) (*per curiam*). There the Court explained: "W. Va. R. Evid., Rule 702 provides that expert opinion testimony may be allowed if it 'will assist the trier of fact to understand the evidence or to determine a fact in issue[.]"

The Circuit Court simply iguored the testimony of the appellees' expert, Mr. Grenz. While this case is less about an overt exclusion of a qualified expert witness, it is certainly about ignoring the helpful evidence he offers. In any event, to refuse to consider the testimony of Mr. Grenz leads to the result that it was error not to consider that testimony. The very fabric of the West Virginia Rules of Evidence., Rule 702 is effectively shredded by the Circuit Court ignoring the testimony of Mr. Grenz, testimony that is certainly relevant under Rule 402 of the West Virginia Rules of Evidence.

West Virginia Rule of Evidence 402 requires the admissibility of all relevant evidence. Additionally, Rule 702 of the West Virginia Rules of Evidence allows for the admission of expert witness testimony which will assist the trier of fact. The Circuit Court erred in effectively nullifying both rules by not considering the testimony offered by Mr. Grenz that the inherent danger in replacing the industrial metal roof could not be made safe.

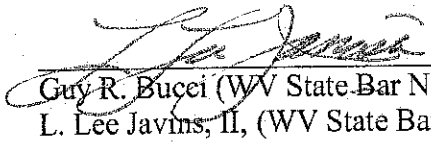
VI.

CONCLUSION

For the foregoing reasons and arguments, appellants pray that this Appeal be granted from the final Order of the Circuit Court of Logan County, Perry, J., and that this case be remanded for trial.

Respectfully submitted,

LANGLEY FRANCE, individually
and as the Parent and Next Friend
of ROBERT FRANCE,
By Counsel



Guy R. Bucci (WV State Bar No. 521)
L. Lee Javins, II, (WV State Bar No. 6613)
D. Blake Carter, Jr. (WV State Bar No. 9970)
BUCCI, BAILEY & JAVINS, L.C.
Post Office Box 3712
Charleston, West Virginia 25337-3712
Telephone (304) 345-0346

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Appeal No. 081348

LANGLEY and INEZ FRANCE, individually and
as the Parents and Next Friends of
ROBERT FRANCE, a Minor,

Appellant,

v.

SOUTHERN EQUIPMENT COMPANY,
a West Virginia Corporation,

Appellee.

CERTIFICATE OF SERVICE

I, L. Lee Javins, counsel for appellant, do hereby certify that the foregoing "**Brief of Appellants**" has been served on counsel of record by depositing a true and exact copy thereof, via United States mail, postage prepaid and properly addressed on this **2nd** day of **December, 2008,** as follows:

Gary E. Pullin, Esquire
Molly K. Underwood, Esquire
PULLIN, FOWLER & FLANAGAN, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301
Counsel for Southern Equipment Company

L. Lee Javins, II (WV State Bar No. 6613)